

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

LARRY TREASTER, ET UX.

APPELLANTS,

**v.
STEVE BETTS, ET AL.**

RESPONDENTS.

DOCKET NUMBER WD71654 Consolidated with WD71857
DATE: November 9, 2010

Appeal From:

Buchanan County Circuit Court
The Honorable Weldon C. Judah, Judge

Appellate Judges:

Division Four: Lisa White Hardwick, Chief Judge, Presiding, Gary D. Witt, Judge, and Keith Marquart, Special Judge

Attorneys:

Patrick J. Berrigan and Joseph P. Masterson, Kansas City, MO, for appellants.

R. Todd Ehlert, Edwin H. Smith and Sharon Kennedy, St. Joseph, MO, for respondents.

MISSOURI APPELLATE COURT OPINION SUMMARY

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APPELLANTS,

v.

STEVE BETTS, ET AL.,

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Buchanan County

Before Division Four Judges: Lisa White Hardwick, Chief Judge, Presiding, Gary D. Witt, Judge, and Keith Marquart, Special Judge

Larry Treaster ("Treaster") appeals the circuit court's granting of Respondents Motion to Dismiss for lack of subject matter jurisdiction.

Treaster's cause of action arises out of an accident that occurred while he was employed by MoKan Transit Concrete, Inc. On January 9, 2003, Treaster was working on a job site pouring concrete when the motor that powered one of the concrete truck's drums stopped operating. In order to prevent the cement from completely hardening, Treaster was told by his supervisor, Steve Betts ("Betts"), to climb on top of the drum to pour water into the drum. The truck on which he was standing was hooked up to another truck to try to turn the drum. While atop the drum, the truck shook violently and Treaster was thrown to the ground, causing him injury.

Treaster filed a personal injury action against Betts, Alan Jenson, and John and/or Jane Doe(s) ("Respondents"). Treaster claimed the negligent acts by Respondents caused his injuries. Respondents filed a Motion to Dismiss claiming Treaster's claims were pre-empted by the Missouri Workers' Compensation Law. The circuit court dismissed Treaster's Petition finding that it lacked subject matter jurisdiction over the cause of action.

REVERSED AND REMANDED.

Division Four holds: Treaster argues it was error for the circuit court to grant Respondents' Motion to Dismiss for lack of subject matter jurisdiction. The circuit court issued its ruling prior to the Missouri Supreme Court's decisions in 2009 which have made clear that the Workers' Compensation exclusivity defense is not a matter of subject matter jurisdiction but rather constitutes an affirmative defense. Therefore, the claim that an incident is covered by the Workers' Compensation Law must be pleaded and proved as provided in Rules 55.08 and 55.27. It is not a defense that can be raised by a motion to dismiss. Accordingly, the case is sent back to the circuit court for further proceedings.

Opinion by: Gary D. Witt, Judge

November 9, 2010

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